

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

STATE OF TEXAS,

Plaintiff,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, *et al.*,

Defendants.

Civil Action No. 5:13-CV-255-C

**MOTION OF BEVERLY HARRISON, TEXAS STATE CONFERENCE OF THE NAACP,
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., & NATIONAL
EMPLOYMENT LAW PROJECT FOR LEAVE TO FILE AMICI CURIAE BRIEF IN
SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 7.2(b), Amici Curiae—Beverly Harrison, Texas State Conference of the NAACP, the NAACP Legal Defense & Educational Fund, Inc., and the National Employment Law Project (“Amici”—respectfully move this Court for leave to file an amici curiae brief in support of Defendants’ Motion for Summary Judgment and accompanying brief (Docs. 91, 92), and Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment (Doc. 100).

Amicus, Beverly Harrison, is a 61-year old Black mother and grandmother who lives in Dallas, Texas and was denied a job with Dallas County Schools as a school crossing guard or bus monitor due to a criminal conviction that, at the time, was nearly 40 years old. Ms. Harrison seeks to be heard in this action as an amicus party because of the critical racial and economic justice issues that this case raises, including her ability to seek gainful employment in Texas in spite of her criminal background. The outcomes that Texas seeks through this lawsuit, including a declaration from this Court that certain Texas employers may legally bar applicants with felony convictions, like Ms. Harrison, from job opportunities, have a strong likelihood of harming Ms.

Harrison's employment prospects.

Amicus, the Texas State Conference of the NAACP ("Texas NAACP"), has more than 70 branches across Texas and is one of the most significant non-profit organizations in the state that promotes and protects the rights of Black Americans and other people of color. The Texas NAACP has worked for decades to eliminate barriers faced by people with criminal records, including in the area of employment, due to the disparate impact that the criminal justice system has had on people of color for generations. The Texas NAACP seeks to be heard in the case as an amicus party because the issues raised here—including the lawfulness of categorical bans on hiring people with felony convictions—have a significant impact on the Black communities and other communities that the Texas NAACP serves. These communities are disproportionately impacted by discriminatory criminal and employment policies, mass incarceration, and the collateral consequences of incarceration, such as gaining employment with criminal records.

Amicus, the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), also has a significant interest in this litigation. Founded in 1940 as the nation's first racial justice law organization, LDF has been a longstanding champion of economic justice issues, litigating the unanimous decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which established the disparate impact theory of liability in the employment context, and challenging laws and policies that exclude individuals with criminal records from jobs. See, e.g., *Waldon v. Cincinnati Pub. Schs.*, 941 F. Supp. 2d 884 (S.D. Ohio 2013) (denying defendants' motion to dismiss a disparate impact case alleging that Black former public school employees were terminated for having been convicted of specified crimes under Ohio law); Mem. & Op., *Little v. Wash. Metro Area Transit Auth. (WMATA)* at 1, 46-47, No. 1:14-cv-01289-RMC (D.D.C. Apr. 18, 2017), ECF No. 186 (certifying a class of affected job applicants with respect to plaintiffs' claim that WMATA's

criminal background check policy is facially neutral, but has a disparate impact on Black applicants). At the heart of this case is Texas's challenge to the legality of the Enforcement Guidance entitled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" ("Guidance") that a bi-partisan EEOC adopted in 2012. The Guidance memorializes case law, like *Griggs*, and decades of EEOC policies that show that categorical bars on hiring people with felony convictions, which Texas seeks a declaration that it can do, may violate Title VII of the Civil Rights Act of 1964, to the extent that they disproportionately impact Black people and other protected groups and are not job related and consistent with business necessity. Moreover, LDF contributed to the efforts that led a bipartisan EEOC to adopt the 2012 Guidance and, therefore, seeks to defend the legality of that Guidance which Texas challenges in this case.

Finally, Amicus, the National Employment Law Project ("NELP"), a non-profit research and advocacy organization, seeks to be heard in this case, like LDF, because of the significant employment issues that this case raises. For more than 45 years, NELP has worked to ensure that America upholds for all workers her promise of opportunity and economic security through work, including through the promotion of "ban the box" initiatives. NELP's Second Chance Labor Project specializes in the employment rights of people with arrest and conviction records and promotes the enforcement of federal, state, and local antidiscrimination laws to reduce employment barriers for workers with records. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers with records, has testified before Congress and numerous state legislatures, and has published extensively on several major areas of criminal background check law and policy. Like LDF, NELP was a leader in the efforts to encourage a bipartisan EEOC to adopt the 2012 Guidance.

This Court has regularly allowed interested parties to file amici briefs in significant cases that are pending before it, such as the instant case. *See, e.g.*, Order, *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-66-C (N.D. Tex. May 5, 2016), ECF No. 38 (granting the motion for leave to file an amicus brief from both the Chamber of Commerce and the Washington Legal Foundation); Order, *Taylor v. Williams*, No. 5:14-CV-149-C (N.D. Tex. Mar. 29, 2016), ECF No. 64 (granting the Attorney General's amicus curiae advisory); Order, *Fonovisa, Inc. v. Alvarez*, No. 1:06-CV-011-C (N.D. Tex. June 15, 2006), ECF No. 26 (considering the amicus curiae brief of Electronic Frontier Foundation in support of the defendant's motion to dismiss); Order, *Welch v. U.S. Air Force*, No. 5:00-cv-392 (N.D. Tex. Sept. 23, 2002), ECF No. 74 (allowing the state of Texas to file an amicus brief). And, in this case, when denying Ms. Harrison and Texas NAACP's recent request to intervene as defendants, this Court, notwithstanding, specifically kept open the option that they may participate as amici curiae. *See* Doc. 90. ("[T]he Movants may seek to participate as *amici curiae* if they so choose.").

In preparing the proposed amicus brief that accompanies this Motion as Exhibit A, the Amici have reviewed the filings of the parties and have endeavored to address issues raised by the pleadings without making redundant arguments, as well as to offer a unique perspective on the issues raised by this case.

This motion should be granted and Amici Curiae—Ms. Harrison, the Texas NAACP, LDF, and NELP—should be permitted to file the amicus curiae brief that is attached as Exhibit A.

Dated: October 25, 2017

Respectfully submitted,

s/ Leah C. Aden

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CERTIFICATE OF CONFERENCE

Pursuant to Rule 7.1 of the Local Civil Rules of the Northern District of Texas, Counsel for Proposed Amici Curiae, have conferred with counsel for the existing parties. On October 24, 2017, Austin R. Nimocks, Counsel for Plaintiff, informed Leah Aden, Counsel for Proposed Amici Curiae, via e-mail, that Plaintiff does not object to Proposed Amici Curiae moving for leave to file an amicus brief in this case. On October 24, 2017, Justin Sandberg, Counsel for Defendants, informed Leah Aden, Counsel for Proposed Amici Curiae, via e-mail, that Defendants take no position on the request for leave to file an amicus brief.

Dated: October 25, 2017

s/ Leah C. Aden

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CERTIFICATE OF SERVICE

I certify that on October 25, 2017, I filed the attached document with the Clerk of the Court using the Court's ECF system. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the ECF system.

s/ Leah C. Aden
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